STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(JUDGES SAAD, CAVANAGH, AND DONOFRIO)
AND THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN R. JACOBS,

Plaintiff-Appellee,

v

TECHNIDISC, INC., a Michigan corporation, and PRODUCER'S COLOR SERVICES, INC., a Michigan corporation,

Defendants-Appellees,

and
MICHIGAN MUTUAL INSURANCE COMPANY, n/k/a AMERISURE MUTUAL INSURANCE COMPANY,

Intervenor-Appellant.
_____/

S. C. NO.: 128715

C.A. NO.: 258271

L.C. NO.: 91-405664-NO

INTERVENOR-APPELLANT'S BRIEF ON APPEAL

SUBMITTED BY:

LACEY & JONES
BY: Gerald M. Marcinkoski P32165
Attorneys for Intervenor-Appellant
600 S. Adams Road, Suite 300
Birmingham, MI 48009
(248) 433-1414

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ISSUES CONTINUED

II.

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STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Intervenor-Appellant's Appendix).

Plaintiff suffered a personal injury arising out of and in the course of his employment with Thomas Goodfellow, Inc. (23a). The nature of plaintiff's injury was "[t]wo [c]racked [r]ibs" (*Id.*). Michigan Mutual Insurance Company (now known as Amerisure Mutual Insurance Company)[1] was Goodfellow's workers' compensation insurer at the time of plaintiff's injury (24a). Amerisure has been paying plaintiff workers' compensation benefits since his injury (25a).

The circumstances of plaintiff's injury arguably created liability in third parties, *i.e.*, the defendants-appellees in this matter. Consequently, plaintiff filed an action in Oakland County Circuit Court against defendants-appellees (13a). Amerisure intervened in that action to assert a statutory right to reimbursement for previously paid workers' compensation benefits and to assert a statutory right to a credit against any future workers' compensation benefits, both pursuant to § 827(5) of the Worker's Disability Compensation Act (*Id.*). MCL 418.827(5).

Plaintiff's third party action had apparently first been submitted to the United States Arbitration and Mediation of Michigan, Inc. (27a; 47a). That submission included an Amended Economic Analysis of plaintiff's future expectation of weekly workers' compensation benefits (27a *et seq.*).[2] The analysis took into account that at age 65 plaintiff would be eligible for old age social security benefits and his receipt of such would reduce his weekly workers' compensation benefits (30a).

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[1] This brief will refer to the insurer as Amerisure.

[2] The Amended Economic Analysis documents were submitted at the trial level in this action, with no apparent objection by plaintiff (47a).

The circuit court action was resolved via a consent judgment entered December 8, 1993 (13a). In the consent judgment, plaintiff and defendants-appellees agreed to settle the third party action for $612,500.00 (*Id.*).

The consent judgment also addressed Amerisure's § 827 reimbursement rights as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that the accrued worker's compensation benefit lien of Michigan Mutual Insurance Company pursuant to MCLA 418.827 to date is Sixty-Five Thousand dollars [$65,000.00] and that Plaintiff, John R. Jacobs shall forthwith pay to Michigan Mutual Insurance Co. the sum of Sixty-Five Thousand dollars [$65,000.00] in full and complete satisfaction of any and all accrued worker's compensation liens for benefits paid by Michigan Mutual Insurance Company to John R. Jacobs to the date of this Consent Judgment.
>
> IT IS FURTHER ORDERED AND ADJUDGED that, subsequent to the entry of this Consent Judgment, Plaintiff, John R. Jacobs shall receive future worker's compensation benefits in the amount of Two Hundred Eleven dollars [$211.00] per week for a period of eight hundred forty-three [843] weeks and shall thereafter be paid the full weekly amount of worker's compensation benefits as required by the Worker's Disability Compensation Act, MCLA 418.401 et. seq., by Michigan Mutual Insurance Co. (13a).

The arithmetical calculation in the final paragraph relates to a formula devised by the Court in *Franges v General Motors Corp,* 404 Mich 590; 274 NW2d 392 (1979). It describes the cost sharing of the third-party recovery expenses between plaintiff and the workers' compensation insurer under MCL 418.827(6).

Ten years after resolution of the third-party action, plaintiff became 65 years old on November 12, 2003 (23a, 24a, 25a). As anticipated, he began receiving old age social security benefits. Workers' compensation insurers are permitted to coordinate weekly workers' compensation benefits with old age social security benefits pursuant to § 354(1)(a) of the Worker's Disability Compensation Act. MCL 418.354(1)(a). Consequently, Amerisure began

coordinating its payments of weekly workers' compensation benefits with plaintiff's old age social security benefits (25a). As a result of that coordination, plaintiff's weekly workers' compensation rate was reduced to $52.03 (*Id.*).

Plaintiff's response to the coordination of his benefits was to file a motion for enforcement of consent judgment with the Oakland County Circuit Court. Amerisure opposed plaintiff's motion on a number of grounds, including the ground that the circuit court is without jurisdiction to resolve a dispute relating to payment of workers' compensation benefits because such questions are exclusively reserved for the Workers' Compensation Agency[3] (36a).

The trial court heard arguments with respect to plaintiff's motion on June 16, 2004. Following the hearing, the trial court entered an order granting plaintiff's motion for enforcement of consent judgment regarding workers' compensation benefits, entered July 28, 2004. The order says in pertinent part:

> NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Enforcement of Consent Judgment Regarding Workers['] Compensation Benefits be in the same hereby is granted and Amerisure Mutual Insurance Co. is order to pay workers['] compensation benefits to Plaintiff, John R. Jacobs[,] in the amount of $211 per week commencing on November 12, 2003 and continuing as ordered in the Consent Judgment of December 8, 1993. (17a).

Amerisure filed a claim of appeal from the trial court's order with the Court of Appeals. The Court of Appeals dismissed the claim of appeal for lack of jurisdiction adding that, *inter alia*, Amerisure may file a delayed application for leave to appeal the circuit court order (19a). Amerisure filed a delayed application for leave to appeal with the Court of Appeals. In an order entered February 22, 2005, the Court denied the delayed application (20a). Amerisure

[3] The "Workers' Compensation Agency" is the present name for the state agency administering workers' compensation. The Agency had formerly been known as the "Bureau of Worker's Compensation." The name change occurred as a result of Executive Order 2003-18.

moved the Court for reconsideration. The Court denied the motion for reconsideration in an order entered April 6, 2005 (21a).

Amerisure applied to this Court for leave to appeal. In an order entered November 3, 2005, the Court granted the application and directed the parties to include among the issues briefed the following:

> (1) whether the trial court has jurisdiction to determine at what rate worker's compensation benefits shall be paid, see *Reed v Yackell*, 473 Mich 520, 542 (2005); (2) whether the December 8, 1993 consent judgment constituted a determination of the worker's compensation benefit rate and the obligation to pay the benefit; (3) if so, whether the trial court had the jurisdiction to issue such a judgment; and (4) whether a trial court judgment in a third-party action is subject to modification when an employee's entitlement to worker's compensation under the compensation act changes. (22a).

The Court in the same order directed that this case be argued and submitted with *VanTil v Environmental Resources Mgmt*, Docket No. 128283. In *VanTil*, the Court cross-referenced this case and directed the parties there to include amongst the issues to be briefed:

> whether the trial court had jurisdiction to determine whether plaintiff was an employee, or whether that question must first be resolved in the worker's compensation adjudicatory system. See *Reed v Yackell*, 473 Mich 520, 542 (2005).

What follows is Amerisure's brief in support of its appeal.

SUMMARY OF ARGUMENT I

Subject matter jurisdiction cannot be conferred on a court by the parties and can be raised at any time. *In re Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993); *In re Fraser*, 288 Mich 392, 394; 285 NW 1 (1939). Here, the circuit court had subject matter jurisdiction over plaintiff's tort claim, but not over plaintiff's weekly workers' compensation disability rate and its duration. MCL 418.827. Plaintiff's weekly disability rate and its duration are matters exclusively within the subject matter jurisdiction of the Workers' Compensation Agency. MCL 418.841(1); MCL 418.131(1).

ARGUMENT I

THE LEGISLATURE HAS SPECIFIED THAT "ANY DISPUTE OR CONTROVERSY CONCERNING COMPENSATION OR OTHER BENEFITS SHALL BE SUBMITTED TO THE [WORKERS' COMPENSATION AGENCY] AND ALL QUESTIONS ARISING UNDER THAT [WORKER'S DISABILITY COMPENSATION] ACT SHALL BE DETERMINED BY" THAT AGENCY. THE INSTANT DISPUTE OVER PLAINTIFF'S WEEKLY WORKERS' COMPENSATION BENEFIT RATE IS A QUESTION "CONCERNING COMPENSATION OR OTHER BENEFITS." AND, THE APPLICABILITY OF THE OFFSETS SPECIFIED IN THE WORKER'S DISABILITY COMPENSATION ACT AGAINST PLAINTIFF'S WEEKLY WORKERS' COMPENSATION BENEFIT RATE IS A "QUESTION[] ARISING UNDER" THAT ACT. THEREFORE, ALTHOUGH THE CIRCUIT COURT HAD JURISDICTION OVER PLAINTIFF'S THIRD-PARTY ACTION, THE CIRCUIT COURT HAD NO SUBJECT MATTER JURISDICTION TO DETERMINE IN THAT THIRD-PARTY ACTION PLAINTIFF'S WEEKLY COMPENSATION BENEFIT RATE AND ITS DURATION BECAUSE THOSE MATTERS ARE EXCLUSIVELY RESERVED FOR THE WORKERS' COMPENSATION AGENCY.

Nothing is more uniquely germane to workers' compensation than setting the appropriate weekly workers' compensation benefit rate and the duration of weekly workers' compensation liability. Rates are carefully crafted by the Worker's Disability Compensation

Act.[4] That Act also allows for offsets against weekly workers' compensation rates for certain other employer-provided benefits.[5] And, the Act also provides a mechanism for determining entitlement to weekly workers' compensation into the future.[6]

The circuit courts of this state are prohibited by law from ordering a weekly compensation benefit rate and specifying a duration of workers' compensation entitlement because the Legislature has specifically provided: "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau [of worker's compensation] and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate". MCL 418.841(1).[7] Therefore, the circuit court in this matter had no subject matter jurisdiction to specify the "future worker's compensation benefits" rate for plaintiff and order that it be paid for a certain duration in the last paragraph of its 1993 consent judgment.[8] Nor did the circuit court have subject matter jurisdiction to later order Amerisure "to pay workers[']' compensation benefits to Plaintiff" at a particular rate and for a future time period in its 2004 order enforcing that consent judgment.[9] The circuit court *did* have subject matter jurisdiction over plaintiff's third-party tort case against defendants-appellees, but its jurisdiction did not extend to specifying plaintiff's weekly compensation rate and ordering it payable into the future.

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[4] MCL 418.101, *et seq*. Weekly rates derive from calculation of the employee's average weekly wage under MCL 418.371. Weekly rates are a percentage of that average weekly wage. MCL 418.351 and MCL 418.361. Weekly rates can differ depending upon whether the employee is found to be "totally" disabled, "partially" disabled, or "totally and permanently" disabled. *Id.* Weekly rates are subject to a maximum adjusted yearly depending on fluctuations in the state's average weekly wage. MCL 418.355. Weekly rates are subject to a minimum amount for certain classes of cases. MCL 418.356.

[5] MCL 418.354. See also, MCL 418.358.

[6] The determination in cases such as this, *i.e.*, general disability for "[t]wo [c]racked [r]ibs," depends on the injury's ongoing impact on the employee's "wage earning capacity" under MCL 418.301(4) (23a-25a)

[7] As indicated in n 3 in the Statement of Facts, the "Bureau of Worker's Compensation" is now known as the "Workers' Compensation Agency".

[8] (16a).

[9] (18a).

Amerisure here asks the Court to vacate the last paragraph of the circuit court's 1993 consent judgment and the circuit court's 2004 subsequent order enforcing that paragraph because those orders are void for lack of subject matter jurisdiction. Amerisure has presently pending before the Workers' Compensation Agency a petition on this rate dispute (46a). That is the only forum where the dispute can legitimately be resolved.

A. Subject Matter Jurisdiction In General

"[S]ubject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *In re Hatcher*, 443 Mich 426, 433, 444; 505 NW2d 834 (1993). The Michigan Constitution grants the circuit courts with subject matter jurisdiction as follows: "The circuit court shall have original jurisdiction in all matters not prohibited by law." Const 1963, art 6, § 13. The Revised Judicature Act similarly says:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. MCL 600.605.

See also, MCL 600.601.

The Legislature has "prohibited by law" exercise of jurisdiction over workers' compensation disputes anyplace except at the workers' compensation administrative agency. This grant of exclusive jurisdiction in the Worker's Disability Compensation Act says:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable. MCL 418.841(1) [first sentence].

This is an exceedingly broad grant of authority. "Any"[10] dispute concerning compensation or other benefits certainly encompasses disputes concerning weekly benefits rates and any offsets against them as recited in the workers' compensation statute. The word "shall" in § 841(1) describes a mandatory, not discretionary, action. *Transamerican Freight Lines, Inc v Quimby*, 381 Mich 149, 158-159; 160 NW2d 865 (1968); *Township of Southfield v Drainage Board for Twelve Towns Relief Drains*, 357 Mich 59, 76-77; 97 NW2d 821 (1959). That mandatory action is to be undertaken by the administrators of the workers' compensation system. That system is different from the state's civil courts. It is a complete departure from common law and equity jurisprudence. *Andrejwski v Wolverine Coal Co*, 182 Mich 298, 302-303; 148 NW 684 (1915). It "require[s] application of extremely technical and interrelated statutory provisions that determine an employee's eligibility for disability benefits." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702 n 5; 614 NW2d 607 (2000).

B. The Subject Matter Jurisdiction Question In This Case

The subject matter jurisdiction question presented in this case relates to plaintiff's weekly compensation rate and its ongoing duration. The question differs somewhat from the subject matter jurisdiction question in the companion case *VanTil v Environmental Resources Mgmt*[11], and in *Reed v Yackell*, 473 Mich 520; 703 NW2d 58 (2005). In those cases, the jurisdictional question arose in the context of the circuit courts deciding whether the plaintiffs are "employees" as that term might be understood under workers' compensation law. In the instant case, the subject matter jurisdiction question arose in the context of plaintiff, who has been receiving workers' compensation all along, suing third-party tortfeasors in relationship to the

[10] "Any" in this context can only mean "every; all". *The Random House Dictionary of the English Language: Second Edition–Unabridged*, p 96 (1987).
[11] Supreme Court Docket No. 128283.

same accident giving rise to his work injury. Under such circumstances, the circuit court clearly does have subject matter jurisdiction to resolve plaintiff's tort claim. But, the circuit court exceeded its subject matter jurisdiction by also ordering a future weekly workers' compensation benefit rate and, still further, by ordering it payable for a particular duration into the future. Those matters are reserved for the workers' compensation system under MCL 418.841(1). Therefore, as in *VanTil* and *Reed*, this case presents a subject matter jurisdiction question. Unlike those cases, the question here arises in the context of a third-party case.

For that reason, some understanding of the third-party provision in the Worker's Disability Compensation Act is necessary for purposes of this case.

C. The Worker's Disability Compensation Act's Third-Party Provision

The third-party provision in the Worker's Disability Compensation Act reads:

> (1) Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section. If the injured employee or his or her dependents or personal representative does not commence the action within 1 year after the occurrence of the personal injury, then the employer or carrier, within the period of time for the commencement of actions prescribed by statute, may enforce the liability of such other person in the name of that person. Not less than 30 days before the commencement of action by any party under this section, the parties shall notify, by certified mail at their last known address, the bureau, the injured employee, or representative or known next of kin, his or her employer, and the carrier. Any party in interest shall have a right to join in the action.
>
> (2) Prior to the entry of judgment, either the employer or carrier or the employee or the employee's personal representative

may settle their claims as their interest shall appear and may execute releases therefor.

(3) Settlement and release by the employee is not a bar to action by the employer or carrier to proceed against the third party for any interest or claim it might have.

(4) If the injured employee or his or her dependents or personal representative settle their claim for injury or death or commence proceedings thereon against the third party before the payment of worker's compensation, such recovery or commencement of proceedings shall not act as an election of remedies and any moneys so recovered shall be applied as herein provided.

(5) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

(6) Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. Expenses of recovery shall be apportioned by the court between the parties as their interests appear at the time of the recovery.

(7) Compensation benefits referred to in this section shall in each instance include by not be limited to all expenses incurred under section 315 and 345.

(8) The furnishing of, or failure to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance, or pursuant to a contract providing for safety inspections or safety advisory services between the employer and a self-insurance service organization or a union shall not subject the insurer or self-insured service organization, or their agents or employees, or the union, its members or the members of its safety committee, to third party liability for damages for injury, death or loss resulting therefrom. MCL 418.827(1)-(8).

To state the obvious, nothing in any part of § 827 says the circuit court sets the future weekly rate of compensation benefits and its duration. Nor could § 827 logically so provide. To do so would create disharmony with § 841(1)'s explicit mandate that disputes "concerning compensation or other benefits" are exclusively for the administrative agency.

D. The History And Rationale For The Third-Party Provision

Prior to enactment of the third-party provision, if an injury created liability in both the workers' compensation insurer (or self-insured) and a third-party tortfeasor, the employee was forced to elect his administrative workers' compensation remedy or sue the tortfeasor in court, but not both. 1912 (1st Ex Sess) PA 10 part III § 15; 1915 CL 5468; 1929 CL 8454; 1948 CL 413.15; *Graham v Michigan Motor Freight Lines, Inc*, 304 Mich 136, 147; 7 NW2d 246 (1943); see also, *Transamerican Freight Lines, Inc*, 381 Mich at 157.

In 1952, the Legislature amended the workers' compensation statute via 1952 PA 155 to add the provision today reflected in § 827. The primary purpose of the amendment was to eliminate the election requirement and to restore an employee's "right to enforce his remedy for damages against the third-party tort-feasor [even though] he accepted [workers'] compensation." *Rookledge v Garwood*, 340 Mich 444, 457; 65 NW2d 785 (1954) (bracketed words are Amerisure's). The Legislature believed forcing an election was ill-advised. The Legislature believed an employee should be in an equal legal position as a person who was injured but not entitled to receive workers' compensation benefits.[12]

After allowing pursuit of both workers' compensation and tort remedies in 1952, the Legislature took care to prevent a duplicative recovery because "workers' compensation law

[12] As it turns out, the employee who collects workers' compensation benefits and sues a third-party tortfeasor is in a better position than other injured persons because subsection 6 of § 827 requires the workers' compensation insurer to share and often entirely assume the payment of the employee's legal expenses (attorney's fees and costs) in the third-party case. By contrast, in other tort cases, the injured party alone bears his or her attorney's fees and costs.

does not favor double recovery." *Thick v Lapeer Metal Products*, 419 Mich 342, 347; 353 NW2d 464 (1984); *Stanley v Hinchliffe & Kenner*, 395 Mich 645, 657-659; 238 NW2d 13 (1976). The Legislature could have avoided a double recovery by providing for reduction of the tort recovery by the amount of workers' compensation benefits. See generally, *Third Party Tortfeasor's Right to Have Damages Recovered by Employee Reduced by Amount of Employee's Workers' Compensation Benefits*, 43 ALR 4th 849 (1986). However, our Legislature chose instead to reduce the workers' compensation insurer's liability. The Legislature chose such a method because the alternative – reduction of the tort recovery – would reward the party at fault. *Great American Insurance Co v Queen*, 410 Mich 73, 89; 300 NW2d 895 (1980); *Pelkey v Elsea Realty & Investment Co*, 394 Mich 485, 493; 232 NW2d 154 (1975); *Petrosian v Frizell*, 25 Mich App 141, 145; 181 NW2d 10 (1970). The Legislature elected instead to afford the workers' compensation insurer relief from some of its liability. That election has the salutary effect of shifting some financial burden for the injury from the workers' compensation carrier (who is often faultless) to the tortfeasor (who is at fault).

The focus within § 827 for present purposes is on subsections 5 and 6. Subsection 5 explains that "[a]ny recovery" in tort, after deducting the expenses of the third-party recovery, "first" reimburses the workers' compensation insurer and, if any balance remains, the balance creates a future credit for the insurer. MCL 418.827(5). Subsection 6 explains that, in exchange for this reimbursement and future credit, the workers' compensation insurer must share the cost of procuring of the third-party recovery. MCL 418.827(6); *Kroll v Hyster Co*, 398 Mich 281, 286-287; 247 NW2d 561 (1976) (KAVANAGH, C.J., lead opinion) and at 296-297 (WILLIAMS, J., concurring in part; dissenting in part). Subsection 6 of § 827 also grants "the court" jurisdiction to, if necessary, direct the division of attorney fees "among the attorneys for

the plaintiff" in the tort action. MCL 418.827(6). And, "the court" shall also apportion the "[e]xpenses of recovery" among the parties "as their interests appear at the time of the recovery." *Id.*

Franges addressed this latter point, *i.e.*, how to compute the workers' compensation insurer's share of the third-party recovery expenses.[13]

E. The Ongoing *Franges* Payment

Franges, which was actually a trilogy of cases, stated the § 827(6) issue as:

> The common issue presented is whether and to what extent the dollar amount credited to the employer as advance payment of future workers' compensation benefits should be included in computing the share of recovery expenses (legal fees and costs) attributable to the employer or its workers' compensation insurance carrier. *Franges*, 404 Mich at 601.

After reviewing various approaches in other states, *Franges* opted for a "'*pari passu*'" approach adopted in a New Jersey appellate division case and a Pennsylvania federal district court decision. *Franges*, 404 Mich at 608.[14] This is a "pay-as-you-go" approach. Under this approach, the workers' compensation insurer must reimburse the employee a share of recovery expenses on a weekly basis after resolution of the third-party case if the insurer uses its

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[13] Amerisure believes *Franges* does not entirely comport with the statute. The Court previously *sua sponte* considered overruling *Franges* but then dismissed the appeal in *Bonarek v Wayne County Board of Institutions*, 433 Mich 880; 451 NW2d 201 (1989). A challenge to the legitimacy of *Franges* was not raised below in this case and, therefore, Amerisure will not argue it now. But, the Court may want to consider *sua sponte* raising the question here, similar to what the Court had done in *Bonarek*. *Id.* Amerisure submits Justice Levin's dissent in *Franges* accurately reflects the text of § 827. The flaw in the *Franges* formula is: The amount allocated for the workers' compensation insurer's "future credit" [the amount of tort recovery which offsets workers' compensation liability after the date of the tort recovery] does not include the employee's share of the cost of recovery; yet, the insurer reimburses to the employee the employee's share of the cost of recovery on a weekly basis. Consequently, the employee is placed in a far better position than other injured persons. The plaintiff will ultimately pay *no* attorney fees or costs under *Franges*. Application of the *Franges* formula can also lead to the absurdity of an insurer paying an employee a weekly cost reimbursement that exceeds the insurer's weekly compensation liability for that week, all for the alleged benefit of the insurer enjoying a future credit against its liability for that week. See Michigan Mutual Insurance Company's Intervening Plaintiff-Appellant's Brief on resubmission, filed in *Bonarek, supra,* signed March 8, 1989.

[14] The New Jersey Supreme Court has since abandoned the approach. *Owens v C&R Waste Material*, 76 NJ 584; 388 A2d 977, 979 (1978).

future credit to offset any ongoing workers' compensation liability. According to the *Franges* majority, this approach follows the statute's requirement that the insurer pay a proportionate share of the recovery expenses. *Franges*, 404 Mich at 608-609. *Franges* reduced its analysis to a mathematical formula.[15]

F. Over What § 827 Issues Does The Circuit Court Have Subject Matter Jurisdiction?

To summarize then, when an employee who is receiving workers' compensation benefits for a work injury also receives a third-party tort recovery related to that work injury, the workers' compensation insurer is to be reimbursed from that recovery for the amount of workers' compensation benefits it had paid through the date of the tort judgment. This is the "reimbursement" portion of § 827. The carrier must share in payment of plaintiff's attorney's fee and costs for that reimbursement at the time of the recovery. Next, the balance of the tort

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[15] The part of the *Franges* formula pertinent here is as follows:

> According to the existing order of the Worker's Compensation Bureau, employee Franges is to receive an award of $104 per week for the rest of his life or until his disability ceases. Thus, each week Franges is entitled to receive compensation benefits but for the third-party recovery, the insurer must pay the following to the employee:
>
> | | | |
> |---|---|---|
> | Employee's Compensable Wage Loss | $ | 104.00 |
> | Apportionment Percentage (51.52888%) | X | .5152888 |
> | Reimbursement to Employee by Insurer for Cost of Recovery | $ | 53.59 per week[19] |
>
> Until the future credit is exhausted, the same formula applies to all other claims compensable under the Worker's Disability Compensation Act. The insurer will reimburse the employee an amount equal to any of the employee's future expenses which are compensable under the act multiplied by the second apportionment percentage, the apportionment percentage for reimbursement to the employee for cost of recovery.

[19] The insurer's future credit is still reduced on a weekly basis by the amount of compensation benefits the employee would have received but for the third-party recovery.

Thus, with employee Franges, the insurer's future credit of $61,252.99 would be reduced on a weekly basis by $104, the weekly compensable wage loss and by any other claims compensable under the act. *Franges*, 404 Mich at 622-623.

recovery (if any) is considered an advance payment by the workers' compensation insurer of future workers' compensation benefits that would otherwise be owing. This is the "future credit" portion of § 827. *Franges* concludes by requiring a week-by-week, ongoing reimbursement of recovery expenses to the plaintiff after the third-party recovery if and when the insurer uses its future credit to offset any ongoing workers' compensation liability.

Under this scheme, circuit courts clearly have had, since the 1952 amendment, jurisdiction to adjudicate employees' third-party tort claims. They also have jurisdiction to divide the attorney fees if there is more than one counsel for plaintiff and apportion the expenses of recovery among plaintiff and the workers' compensation insurer.

Plaintiff's future weekly rate of compensation benefits and its duration are neither "[a]ttorney fees" nor "[e]xpenses of recovery" under § 827(6). Recognition of this point is crucial to understanding the circuit court's erroneous assumption of jurisdiction in this case. While it is not unusual for attorneys to loosely refer to *Franges'* weekly payment after the third-party recovery as a benefit rate, that description is inartful and wrong. The post-recovery *Franges'* rate is a weekly reimbursement of litigation costs, *not* a weekly compensation benefit rate. *Franges* recognized this by correctly labeling the ongoing weekly payment: "Reimbursement to Employee by Insurer for Cost of Recovery". *Franges*, 404 Mich at 622. This ongoing "[r]eimbursement" is triggered only if the insurer uses its future credit to offset compensation "each week Franges is entitled to receive compensation benefits". *Franges*, 404 Mich at 622. *Franges* acknowledged the insurer's post-third-party recovery reimbursement is "contingent" and payable only *if* the plaintiff will continuously qualify for workers' compensation benefits:

> That contingent future interest[18] [of the insurer] is the dollar amount recovered by the employee after payment of recovery costs

> and credited to the insurer as advance payment of future compensation benefits. In fact, this contingent interest begins to accrue and to vest the first day after settlement, *provided the employee would have qualified for continued compensation* but for the third-party tortfeasor recovery.
>
> [18] We do not use the language "contingent future interest" in the traditional property law context. We use this language as a descriptive phrase characterizing the insurer's future compensation credit. *Franges*, 404 Mich at 621 (emphasis and bracketed words are Amerisure's).

Franges recognized a workers' compensation carrier cannot be charged with paying future expenses "when future compensation payments may never be required". *Franges*, 404 Mich at 614.

This only makes sense. An employee's injury may completely heal before a future credit is exhausted. Under such circumstances, the employee would no longer be entitled to weekly workers' compensation benefits. The workers' compensation insurer would then have no need to apply a future credit because nothing is owing if "his disability ceases." *Franges*, 404 Mich at 622. No one can reasonably assert that payments continue even though the employee has recovered from the work injury and is no longer entitled to weekly workers' compensation benefits. *If* workers' compensation liability continues and *if* the insurer uses the future credit to offset it, then – and only then – a cost reimbursement obligation arises per *Franges*.

G. The Circuit Court Judgments In This Case

The circuit court in this case had jurisdiction over plaintiff's tort claim under MCL 418.827(1). And, it had jurisdiction to divide the attorney fees and apportion the expenses of the third-party case between the parties. MCL 418.827(6). It did not have the power to go beyond that and decide workers' compensation benefit rates and ongoing entitlement to disability benefits.

What has happened here as a practical matter can easily be surmised. Plaintiff's rate of ongoing weekly reimbursement was mischaracterized by the court and the parties as a weekly disability benefit rate. It is actually a weekly reimbursement of legal costs resulting from the insurer's exercise of its future credit to offset workers' compensation liability. And, for arithmetic purposes, the court and the parties calculated the duration of such payments as if plaintiff's entitlement status was forever frozen in time.[16] Inclusion of the arithmetical calculation may have been borne of a desire to memorialize the math as things then stood. Regardless, the mischaracterization of the rate and memorialization of the arithmetic should not have taken the form of a judgment of the circuit court because the court had neither subject matter jurisdiction to set a rate nor the subject matter jurisdiction to lock it in on a presumption of ongoing entitlement to that benefit amount.

Bowie v Arder, 441 Mich 23, 56; 490 NW2d 568 (1992) makes the point of explaining that exercise of legitimate jurisdiction in an action does not extend to ancillary questions over which the court has no subject matter jurisdiction. In *Bowie*, the circuit court had subject matter jurisdiction over a custody dispute. *Bowie* explains, however, that a circuit court exceeds its jurisdiction when it issues orders in that action over which it has no subject matter jurisdiction. ["We hold, then, that a circuit court exceeds its subject matter jurisdiction when, in an original action pursuant to the Child Custody Act, it enters an order transferring custody from

[16] When the consent judgment was entered in 1993, plaintiff was well under 65 years of age (23a, 24a, 25a). As a consequence, he was not receiving old age social security benefits that would reduce his weekly compensation rate below $211. Further, plaintiff's receipt of old age social security benefits could not be assured because no party knows for certain the amount of plaintiff's old age social security benefits, when plaintiff may elect to receive them, whether plaintiff would resist their receipt, or whether plaintiff would even still be receiving weekly workers' compensation benefits. Notably in this regard, the Worker's Disability Compensation Act provides a detailed procedural scheme for, in effect, forcing an employee to apply for old age social security benefits but not for "early" federal social security old age benefits, if the employee also qualifies for weekly workers' compensation disability benefits. See MCL 418.354(2)-(12).

a parent to a third party where there is no dispute between the parent and the third party with regard to the custody of the child." *Bowie*, 441 Mich at 54. Such matters are "exclusively within the jurisdiction of the probate court." *Id*].

This only makes sense as well. For example, in a workers' compensation proceeding between an employee and her employer, a workers' compensation magistrate cannot go beyond his subject matter jurisdiction and also decide an unemployment compensation benefit dispute between the two parties.

Two Court of Appeals' decisions are worth mentioning in specific relationship to § 827(5) and (6) and their borderlines of jurisdiction. In *Seay v Spartan Aggregate, Inc*, 183 Mich App 46; 454 NW2d 186 (1990), the Court said the "clear language of the current statute [§ 827(6)] bestows the responsibility for dividing attorney fees and apportioning the expenses of recovery between the parties on the court, not on the Bureau of Workers' Disability Compensation." *Seay*, 183 Mich at 51 (parenthetical addition is Amerisure's). An employee later urged in *McMiddleton v Great Lakes Steel/Second Injury Fund*, 225 Mich App 326; 570 NW2d 484 (1997) that *Seay* means the workers' compensation agency cannot apply the future credit under § 827(5). The Court of Appeals disagreed. *McMiddleton* recognized that § 827(6) vested jurisdiction for proportioning attorney fees and expenses in the court, whereas § 827(5) contains no reference to "the court" and describes the workers' compensation question of application of the future credit created by the tort recovery against ongoing weekly workers' compensation liability. *McMiddleton* explained:

> The holding in *Seay* was grounded on this Court's interpretation of subsection 6, which explicitly provides that "[a]ttorney fees . . . shall be divided among the attorneys for the plaintiff as directed *by the court*," and that "[e]xpenses of recovery shall be apportioned *by the court*" (emphasis added). Subsection 5 does not contain similar language. Before *Seay*, this Court had found that the

> Worker's Compensation Bureau is vested with authority to allocate credit from third-party tort judgments to insurers that paid worker's compensation benefits. *Logan v Edward C Levy Co*, 99 Mich App 356, 360; 297 NW2d 664 (1980); *Hakkinen v Lake Superior Dist Power Co*, 54 Mich App 451, 453; 221 NW2d 202 (1974). *Seay* did not purport to overrule the prior holdings of this Court. Accordingly, we conclude that the Worker's Compensation Bureau, the administrative body vested with the power to review "[a]ny dispute or controversy concerning compensation or other benefits" and resolve "all questions arising under [the Worker's Disability Compensation Act]," MCL 418.841(1); MSA 17.237(841)(1), *Aetna Life Ins Co v Roose*, 413 Mich 85, 90-91; 318 NW2d 468 (1982), is jurisdictionally empowered to determine the validity of a benefits provider's lien arising under MCL 418.827(5); MSA 17.237(827)(5). Under the circumstances of this case, the magistrate could as easily apply the *Franges* formula as could a successor judge in the Wayne Circuit Court.[1]
>
> [1] We note that calculation and apportionment of attorney fees and recovery expenses are an inherent part of a full application of the *Franges* formula to the facts of a given case. See *Franges*, *supra* at 617-623. Of course, under *Seay*, *supra*, the magistrate is prohibited from making these calculations. However, application of the *Franges* formula in the instant case does not implicate the verboten determinations, because the Second Injury Fund did not participate in the third-party action, and therefore is not responsible for fees or costs of recovery. *McMiddleton*, 225 Mich App at 330-331.[17]

H. Can Amerisure Question The Circuit Court's Subject Matter Jurisdiction At This Point?

A legitimate question is whether Amerisure can challenge the circuit court's jurisdiction given that Amerisure, along with counsel for plaintiff and defendants, signed the circuit court's 1993 consent judgment that mistakenly described an ongoing rate of weekly compensation and projected it for a particular duration. Amerisure can challenge the legitimacy

[17] It is important to recognize that when *McMiddleton* says a circuit court judge could also apply the *Franges* formula, *McMiddleton* is not saying the circuit court can legitimately set a weekly compensation benefit rate and a date for ongoing disability benefits because *Franges* itself did not do that and neither § 827 nor § 841(1) disability permits it. *McMiddleton* is here addressing other steps in the *Franges* formula. *Franges*, 404 Mich at 617-621.

of that order because subject matter jurisdiction was not conferred upon the court by agreement of the parties and subject matter jurisdiction can be challenged at any time.

The Court has specifically held: "subject matter jurisdiction cannot be conferred on the court by the consent of the parties. *Lehman v Lehman*, 312 Mich 102, 106; 19 NW2d 502 (1945)." *In re Hatcher*, 443 Mich at 433. In *Bowie*, 441 Mich at 56, the Court similarly explained:

> The jurisdiction of a court arises by law, not by the consent of the parties. *Straus v Barbee*, 262 Mich 113, 114; 247 NW2d 145 (1933). Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction. *Shane v Hackney*, 341 Mich 91, 98; 67 NW2d 256 (1954).

See also, *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939) ["Jurisdiction cannot rest upon waiver or consent. (Citations omitted)."].

Therefore, the 1993 order signed by the parties did not vest the circuit court with subject matter jurisdiction over plaintiff's workers' compensation benefit rate and his entitlement to disability benefits. And, the circuit court's subsequent order in 2004, which merely enforced its preceding order, is likewise void. Again, *Bowie* is instructive. *Bowie* faced a series of orders premised upon an original order that should have never been entered due to lack of subject matter jurisdiction in that child custody case. *Bowie* explained:

> We cannot hold that the original custody order is null and void [for lack of subject matter jurisdiction], but uphold the subsequent custody order that was dependent upon it, without gross speculation with regard to what action the parties would have taken had the circuit court properly dismissed the original action for want of jurisdiction. ...
>
> Thus, we hold that the original order awarding custody of Kaye Star to Mike and Tuyet and all subsequent orders entered by the circuit court with respect to the custody of Kaye Star are void for want of subject matter jurisdiction. *Bowie*, 441 Mich at 57-58.

Not only can the parties not confer subject matter jurisdiction by agreement, the issue can be raised at any time – even *sua sponte*. *In Re Fraser*, 288 Mich at 394; see also, *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965) ["When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."]. Lack of subject matter jurisdiction can be raised at any time because, where a court acts without subject matter jurisdiction, the court's action is actually *void ab initio*.[18] The *Hatcher* Court explained:

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[18] A distinction is sometimes made between subject matter jurisdiction, which can never be waived because it is *void ab initio*, and an error by a court on a jurisdictional question after legitimately asserting jurisdiction over the parties and subject matter. *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538, 544-546; 260 NW 908 (1935). In *In Re Hatcher*, the Court explained this distinction as follows:

> As explained in *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538, 545-546; 260 NW 908 (1935),
>
> > "Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made." 33 CJ, pp 1078, 1079.
>
> The reasoning of Jackson City Bank has been followed by a number of Michigan courts since its decision in 1935. [Citations and footnote omitted].
>
> > Generally, lack of subject matter jurisdiction can be collaterally attacked and the exercise of that jurisdiction can be challenged only on direct appeal. *Life Ins Co of Detroit v Burton*, 306 Mich 81; 10 NW2d 315 (1943); *Edwards v Meinberg*, 334 Mich 355; 54 NW2d 684 (1952).
> >
> > Where the probate court erroneously exercises its jurisdiction, the error is analogous to a mistake in an information or in binding over a criminal defendant for trial. Such an error can, of course, be challenged in a direct appeal. It cannot, however, be challenged years later in a collateral attack. If such a delayed attack were always possible, decisions of the probate court would forever remain open to attack, and not finality would be possible. [*In re Adrianson*, 105 Mich App 300, 309; 306 NW2d 487 (1981).] *In re Hatcher*, 443 Mich at 438-440.

Here, as explained in the text, we are addressing a lack of subject matter jurisdiction over workers' compensation questions because the circuit court was not authorized to adjudicate workers' compensation disability rates and entitlement because that these matters are exclusively reserved for the Workers' Compensation Agency.

> It is beyond question that a party may attack subject matter jurisdiction at any time. *Shane v Hackney*, 341 Mich 91; 67 NW2d 256 (1954). In fact, a proven lack of subject matter jurisdiction renders a judgment void. *In re Hague*, 412 Mich 532; 315 NW2d 524 (1982). *In re Hatcher*, 443 Mich at 438.

I. Sewell Was Wrongly Decided

Case law until 1984 had consistently recognized this lack of subject matter jurisdiction over workers' compensation disputes in the circuit courts and the corresponding exclusivity of jurisdiction vested in the workers' compensation's administrative agency. *E.g.*, *Jesionowski v Allied Products Corp*, 329 Mich 209; 45 NW2d 39 (1950); *Dershowitz v Ford Motor Co*, 327 Mich 386; 41 NW2d 900 (1950); *Morris v Ford Motor Co*, 320 Mich 372; 31 NW2d 89 (1948); *Munson v Christie*, 270 Mich 94; 258 NW 415 (1935); *Houghtaling v Chapman*, 119 Mich App 828; 327 NW2d 375 (1982); *Buschbacher v Great Lakes Steel Corp*, 114 Mich App 833; 319 NW2d 691 (1982); *Dixon v Sype*, 92 Mich App 144; 284 NW2d 514 (1979); *Herman v Theis*, 10 Mich App 684; 160 NW2d 365 (1968).

A lead case on this subject was *Szydlowski v General Motors Corp*, 397 Mich 356; 245 NW2d 26 (1976), a wrongful death action. There, an employee of General Motors [GM] was injured at work. "GM treated the injuries and the death was attributed to the improper administration of medicine and drugs." *Szydlowski*, 397 Mich at 357. The employee's widow brought an action in circuit court for negligence.

Szydlowski explained the widow was seeking relief in the wrong forum. The workmen's compensation department, as it was then known, was the proper venue for resolution of workers' compensation questions including the "'*initial* determination as to jurisdiction and liability'." *Szydlowski*, 397 Mich at 359 (emphasis is Amerisure's). Quoting from *Herman v Theis*, *Szydlowski* said:

In *Herman v Theis*, 10 Mich App 684, 688-689; 160 NW2d 365 (1968), the Court of Appeals made this analysis:

> "Acceptance of plaintiff's argument that the workmen's compensation act does not apply because he does not fall under the conditions of recovery, with the result that he should be permitted to go to court on a common-law negligence theory, is contrary to the intent of the legislature in creating the act, *i.e.*, that compensation be provided therein to employees for injury arising out of and in the course of employment. See *Andrejwski v Wolverine Coal Co*, 182 Mich 298 [148 NW 684] (1914); *Johns v Wisconsin Land & Lumber Co*, 268 Mich 675 [256 NW 592] (1934). Issues concerning injuries and whether they grew 'out of and in the course of the employment relationship' are to be exclusively within the purview of the workmen's compensation department, and the merits of such a claim are to be first evaluated by the department."

The panel "found that a plaintiff's remedy against an employer based on an injury allegedly arising out of an employment relationship properly belongs within the workmen's compensation department for initial determination as to jurisdiction and liability". Also see *Federoff v Ewing*, 29 Mich App 1; 185 NW2d 79 (1970), and *St Paul Fire & Marine Insurance Co v Littky*, 60 Mich App 375; 230 NW2d 440 (1975).

In this case the Court of Appeals panel said "the continuing vitality of [*Theis*] is open to serious question." We find that *Theis* accurately states the law and reminds us that the procedures for workmen's compensation cases have been statutorily established. It properly cautions us against a shortcut or circumvention of those procedures. *Szydlowski*, 397 Mich at 358-359.

The observation that the initial question -who determines jurisdiction?- is vested in the agency was later reflected in *Aetna Life Insurance Co v Roose*, 413 Mich 85; 318 NW2d 468 (1982). In *Roose*, the question presented was whether a reimbursement agreement executed between Ms. Roose and her employer's group insurance company fell within workers'

compensation's subject matter jurisdiction. The employee argued it did not. The Court quickly disagreed, saying:

> Defendant[-Roose]'s jurisdictional argument does not bear close examination. By the very act of finding the agreement to be within, or excluded from, the provisions of the act, the bureau is exercising subject matter jurisdiction, and rightly so. Section 841 grants the bureau broad authority to review "*any* controversy concerning compensation * * * *and all questions* arising under this act". *Roose*, 413 Mich at 91 (emphasis in original).

After *Szydlowski* and *Roose*, the Court abandoned this view in *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1984). Mr. Sewell sued Armco Steel Corporation in tort claiming it had assumed control over a safety program from General Motors and, as a consequence, was responsible for his injury. Armco countered that the bureau of worker's compensation had exclusive jurisdiction to resolve whether it was the true employer. The Court disagreed with Armco. *Sewell* said *Szydlowski*'s rule was "not so broad" as to confer exclusive jurisdiction over the threshold jurisdictional question on the bureau of worker's compensation. *Sewell*, 419 Mich at 62. *Sewell* said the circuit courts "retain the power to decide the more fundamental issue whether plaintiff is an employee (or fellow employee) of the defendant" for purposes of determining whether it (the circuit court) has jurisdiction. *Sewell*, 419 Mich at 62.

In the Court's order granting leave in this case, the Court asked the parties to brief the subject matter jurisdiction question in light of "*Reed v Yackell*, 473 Mich 520, 542 (2005)" (22a). This citation refers to Justice Corrigan's *Reed* dissent. Justice Corrigan there opined *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1994) was wrongly decided. *Reed*, 473 Mich at 542 (CORRIGAN, J., dissenting opinion). Amerisure agrees.

Amerisure adopts Justice Corrigan's opinion in *Reed* that "Sewell, [*supra*,] was wrongly decided" and, instead, pre-*Sewell* case law correctly reflects the law. Amerisure cannot improve on Justice Corrigan's analysis. Justice Corrigan explained:

> Moreover, the shared jurisdiction approach established by *Sewell* suffers from an unconvincing rationale and lack of clarity in application. As Justice LEVIN [in *Sewell*] aptly opined, there is little reason to assume that employment status determinations are any "more fundamental" than other questions involved in determining whether a plaintiff's claim sounds in worker's compensation or tort. *Sewell*, *supra* at 70 (LEVIN, J., concurring). Thus, *Sewell*'s "more fundamental" rationale for concurrent jurisdiction appears both unprincipled and groundless.
>
> F. *SZYDLOWSKI'S* APPROACH
>
> This Court's opinion in *Szydlowski* provides the more textually faithful approach to determining jurisdiction when the WDCA is implicated. Contrary to *Sewell*, the jurisdictional inquiry in the first instance should be referred to the WCB upon petition by either party in a court action. *Reed*, 473 Mich at 559 (CORRIGAN, J., dissenting opinion).

Justice Corrigan summarized as follows:

> I am persuaded that *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1984), was wrongly decided. It held that the WCB and the circuit court share jurisdiction to determine a worker's employment status. *Sewell*'s assumption of jurisdiction shared with the WCB violated the plain language of MCL 418.161 without even so much as an analytic nod to the statutory scheme conferring jurisdiction in the WDCA. *Sewell* overruled longstanding authority that had correctly implemented the statute, including *Szydlowski v Gen Motors Corp*, 397 Mich 356; 245 NW2d 26 (1976). Moreover, it contradicted the legislative scheme established to determine disputes involving the award of worker's compensation benefits. *Reed*, 473 Mich at 542-543 (footnote omitted).

Reed's lead opinion resisted overruling *Sewell* for procedural and substantive reasons. Procedurally, *Reed*'s lead opinion said neither party had raised or briefed the jurisdictional issue. That poses no problem here. Here, in the latest round of proceedings,

Amerisure raised and urged the subject matter jurisdiction question at the trial level and thereafter (36a *et seq.*).

Substantively, *Reed* said that at oral argument plaintiff had suggested § 841(1)'s language may mean that, before deciding any questions arising under the workers' compensation Act, the circuit court may also determine if the cause of action is in tort or workers' compensation.

Justice Corrigan explained, however, that if the employment status of an injured employee, such as in *Reed* and *VanTil*, is in dispute, then the issue is necessarily one "arising under" the workers' compensation statute with its elaborate description of "employee", with its particular rules and exclusions from the category of employee, and with workers' compensation's pertinent case law development of those inquiries. MCL 418.161. Justice Corrigan correctly observed that: "any dispute regarding whether an injured party is an 'employee' is necessarily one 'arising under' the WDCA, the WCB is the designated forum to determine that question." *Reed*, 473 Mich at 553. Amerisure agrees.

Reed's lead opinion noted Justice Corrigan's "compelling" argument, but said its conclusion is "not entirely clear at this point." *Reed*, 473 Mich at 539. In an attempt to address any remaining uncertainty, Amerisure submits the following.

The sweeping language in the Worker's Disability Compensation Act signals both broad and "exclusive" entrustment of all questions to the Workers' Compensation Agency and that would include the threshold jurisdictional question. MCL 418.131(1). If not, the Legislature would have said so. The Legislature proved capable of carving out one exception to that exclusive jurisdiction, but one exception only. Where an employee sues the employer for a work injury, there is a statutory exception for an "intentional tort." MCL 418.131(1). If the

Legislature had wanted another exception for "shared jurisdiction," then the Legislature would have said so. Not having done so, a circuit court cannot legitimately reserve for itself jurisdictional questions without encroaching on the Legislature's prerogative. When one further considers the Legislature created workers' compensation in derogation of common law and equity jurisprudence, it would make little sense to say the Legislature also intended the circuit courts to apply their own common law and equity jurisprudence to determine who is or is not an "employee". The administrative agency with the specialized knowledge and the expertise entrusted to it by the Legislature should make the jurisdictional inquiry in the first instance. More uniform application of the meaning of the term "employee" (and like considerations) will result where the one body is charged with defining the term. We know that § 841(1) charges the administrative body with deciding such questions. Why so charge another body as well?

Granted, there are cases where employees as plaintiffs are pursuing defendants, who also happen to be their employers, in non-workers' compensation cases. See *e.g.*, *Harris v Vernier*, 242 Mich App 306, 321 n 9; 617 NW2d 764 (2000). But, those are cases where the employer-employee relationship is either irrelevant to the action, *e.g.*, *Panagos v North Detroit General Hospital*, 35 Mich App 554, 558-559; 192 NW2d 542 (1971) [an employee's injury while eating in the hospital's cafeteria related to a vendor-vendee relationship not to an employer-employee relationship], or where the remedy sought by an employee relates to an independent *statutory* right, such as a violation of Michigan's civil rights act protecting employees from unlawful discrimination, *e.g.*, *Boscaglia v Michigan Bell Telephone Co*, 420 Mich 308; 362 NW2d 642 (1984), or an intentional tort, MCL 418.131(1). Neither category of case presented itself in *Reed*, *VanTil*, and certainly not the instant case.

In fact, even *Sewell* would agree that the benefit rate and entitlement questions at issue in this case are exclusively reposed in the administrative agency. *Sewell* approvingly quoted Judge Brennan in *Nichol v Billot*, 80 Mich App 263, 272 n 1; 263 NW2d 345 (1977), who had made the initial effort to distinguish *Szydlowski*. *Sewell* said:

> "'If the suit conflicts with the ability of the Workmen's Compensation Bureau *to award compensation*, then the circuit court must deny the parties' attempt to litigate there.'" *Sewell*, 419 Mich at 64, quoting Judge Brennan's dissent in *Nichol* (emphasis is Amerisure's). . .
>
> "'I would distinguish that case as dealing with a claim involving the grant of workmen's compensation benefits under circumstances which would have completely usurped the primary function of the Workmen's Compensation Bureau had the Court allowed the circuit court concurrent jurisdiction. Plaintiff based her entire suit on the mandatory WDCA warranty insuring "reasonable medical, surgical and hospital services". Given the way she framed her action, *the trial court could not have given judgment without directly passing upon a recovery provision of the act*. Certainly such action would serve to replace the exclusive function the act reserved to the Workmen's Compensation Bureau.'" *Sewell*, 419 Mich at 63-64, quoting Judge Brennan's dissent in *Nichol* (emphasis is Amerisure's).

Here, the circuit court had no subject matter jurisdiction to determine the rate of compensation benefits and the length of plaintiff's entitlement *even under Sewell,* let alone *Szydlowski*. Therefore, even if *Sewell* is overruled only prospectively (as suggested by *amicus curiae* Workers' Compensation Law Section of the State Bar of Michigan), the circuit court judgments in this case fail because even *Sewell* does not support the circuit court's assertion of subject matter jurisdiction.

J. *Robinson* Principles Militate In Favor Of Overruling *Sewell*

Sewell should be overruled so as to dispel all doubt on the subject matter jurisdiction question and to settle the unevenness between *Sewell* and *Szydlowski* (and

Szydlowski's predecessors). Examination of the principles enunciated in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000) justify overruling *Sewell*.

Before turning to those *Robinson* factors, Amerisure first endorses Justice Corrigan's view that "stare decisis should not prevail over a legislative directive." *Reed*, 473 Mich at 560. To hold otherwise allows "'past rulings that usurp power properly belonging to the legislative branch'" to continue on their illegitimate way. *Robinson*, 462 Mich at 473.

Turning to the *Robinson* factors nevertheless, the first consideration is whether the earlier case was wrongly decided. Amerisure submits that *Sewell* was wrongly decided for the reasons summarized above and for the other reasons identified in Justice Corrigan's dissenting *Reed* opinion.

Second, *Robinson* considerations include:

> Courts should also review whether the decision at issue defies "practical workability," whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision. [Citation omitted.] *Robinson*, 462 Mich at 464.

Most important of these is "the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Robinson*, 462 Mich at 466.

With respect to practicality, *Sewell* does create practical problems. One problem is: What if each forum – the court and agency – proceed to resolve the jurisdictional question and they do not agree? To avoid such a conflict, resolution of the question should be lodged in one body rather than there being "shared jurisdiction." There is no debate the administrative agency has authority to decide issue under § 841(1). No other forum should decide it. Practical problems are also illustrated by the result in *Reed*, *i.e.*, reversal and transfer of jurisdiction to the bureau of workers' compensation rendering the long *Reed* circuit court litigation meaningless.

Amerisure also refers the Court to the practical problems that will result if exclusive jurisdiction in the agency is not recognized in this case as described in Argument II that follows.

With respect to reliance, most persons assume the workers' compensation agency is the proper forum to address workers' compensation questions. Most persons faced with a reduction in their weekly compensation rate would expect the controversy to be adjudicated in the workers' compensation system. No one should be surprised if that is where the question is resolved.

The Court should now return the law to not only what it had been pre-*Sewell* but to what, Amerisure submits, the law has said all along.

K. Conclusion

The dispute in this case is whether Amerisure can legitimately reduce plaintiff's weekly rate of compensation under MCL 418.354(1)(a) of the Worker's Disability Compensation Act, given that plaintiff has now turned 65 years of age and has began receiving old age social security benefits. More sharply narrowed, the question is *where* this workers' compensation benefit rate and offset dispute should be resolved. To merely state the question is to answer it. A circuit court is not vested with jurisdiction to resolve such questions in light of MCL 418.841(1).

The circuit court was vested with jurisdiction to recite the amount of attorney fees and apportion the expenses of the third-party recovery between the parties. What the court did not have jurisdiction to do was – as a result of those calculations – set a future weekly workers' compensation disability benefit rate and set it for a particular duration. Those determinations exclusively belong to the Workers' Compensation Agency.

ARGUMENT II

IF THE CIRCUIT COURT JUDGMENTS ARE NOT *VOID AB INITIO*, THEN THE WEEKLY WORKERS' COMPENSATION BENEFIT RATE RECITED IN THOSE JUDGMENTS CAN, NEVERTHELESS, BE ALTERED UNDER THE WORKERS' COMPENSATION SYSTEM WHEN CHANGES RECOGNIZED BY THAT SYSTEM AFFECTING THE RATE OCCUR.

If the circuit court's orders are not *void ab initio* for lack of subject matter jurisdiction, they are alterable nonetheless upon application of workers' compensation rules that should be administered by the Workers' Compensation Agency, as even *Sewell* would admit.

As a general rule, rates of workers' compensation benefits are fluid and not considered final under workers' compensation law. For example, not even *res judicata* bars revisiting and adjusting rates of compensation. *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 640; 433 NW2d 787 (1988) ["In a wide variety of circumstances, an employee's *future* rate of workers' compensation benefits is subject to change." (Emphasis in original).]; *Pike v City of Wyoming*, 431 Mich 589, 600; 433 NW2d 768 (1988) ["The amount of benefits awarded to an injured employee is subject to change upon the occurrence of various events."]; *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379-383; 521 NW2d 531 (1994) ["Rates of compensation, including the reasonable cost of medical services and nursing care are subject to fluctuation depending on economic circumstances." *Id.* at 383.]; see also, *Gusler v Fairview Tubular Products*, 412 Mich 270, 298; 315 NW2d 388 (1981), *reh'g granted*, 414 Mich 1102 (1982), *appl dismissed*, 414 Mich 1102 (1983) ["[A]ny benefits due and not yet paid or to be awarded after the date of this opinion shall be in accord with this (rate) ruling." (Parenthetical word is added for clarity by Amerisure)]. Questions relating to altering rates of weekly

compensation benefits are governed by specific provisions in the workers' compensation statute, as noted in n 4 of this brief at page 7, as well as by varying factual circumstances. *Reiss v Pepsi Cola Metropolitan Bottling Company,* 249 Mich App 631, 637; 643 NW2d 271 (2002).

Here, Amerisure altered plaintiff's weekly rate of compensation after plaintiff began receiving old age social security benefits at age 65. Amerisure is permitted to do so via the coordination of benefits provision of the Worker's Disability Compensation Act, MCL 418.354.[19] Plaintiff resisted and filed a motion in circuit court to contest the change. Amerisure filed a petition to determine rights seeking approval for the change (and recoupment) in the Workers' Compensation Agency where the matter now pends (46a).

The Workers' Compensation Agency clearly has the authority under § 841(1) to resolve the question of whether Amerisure can coordinate plaintiff's weekly workers' compensation benefits with his old age social security benefits from the time plaintiff began receiving the latter. Consider then that there is a very real possibility of inconsistent rulings from the circuit court and the Workers' Compensation Agency on the rate issue. The circuit court has not allowed any alteration. The Agency likely will order alteration because there is no serious question about the legitimacy of coordinating plaintiff's old age social security benefits with

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[19] MCL 418.354(1)(a) provides in pertinent part:

> This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f, payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:
>
> (a) Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act.

reference to the Worker's Disability Compensation Act. MCL 418.354(1); *Franks v White Pine Copper Division*, 422 Mich 636; 375 NW2d 715 (1985).

Consider further that, if the circuit court's 2004 order enforcing the court's original order trumps any workers' compensation agency order permitting the alteration in plaintiff's rate, needless problems and complexities will result. Should the Agency hold that, in observance of the circuit court's order plaintiff's weekly rate cannot be reduced, plaintiff will be overpaid weekly workers' compensation benefits every week subsequent to his 65th birthday. Since the Agency must resolve Amerisure's presently pending petition raising the question of coordination and since there is no dispute about § 354(1)'s application under workers' compensation principles, the Agency will likely order recoupment of an overpayment of benefits for weeks after plaintiff's 65th birthday. Plaintiff would then owe Amerisure the difference between the amount he is receiving each week under the consent judgment and the lesser amount to which he is entitled under workers' compensation law. Plaintiff will be obliged to repay Amerisure that difference each week. MCL 418.833(2).[20] If plaintiff does not repay willingly, then Amerisure would proceed to enforce the recoupment order in – of all places – the circuit court. MCL 418.863.[21]

Payment of workers' compensation benefits is not supposed to be this convoluted. Instead, it is to be as simple as possible. See generally, *Franks*, 422 Mich at 661; *Hiltz v Phil's Quality Market,* 417 Mich 335, 350; 337 NW2d 237 (1983); *Samels v Goodyear Tire & Rubber*

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[20] "When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action." MCL 418.833(2).

[21] "Any party may present a certified copy of an order of a worker's compensation magistrate, an arbitrator, the director, or the appellate commission in any compensation proceeding to the circuit court for the circuit in which the injury occurred, or to the circuit court for the county of Ingham if the injury was sustained outside this state. The court, after 7 days' notice to the opposite party or parties, shall render judgment in accordance with the order unless proof of payment is made. The judgment shall have the same effect as though rendered in an action tried and determined in the court and shall be entered and docketed with like effect." MCL 418.863.

Co, 323 Mich 251, 259; 35 NW2d 265 (1948); *Rotondi v Chrysler Corp*, 200 Mich App 368, 373-374; 504 NW2d 901 (1993); *Lulgjuraj v Chrysler Corp*, 185 Mich App 539, 542; 463 NW2d 152 (1990). Confusion and multiplicity of lawsuits is easily avoided by allowing the Agency charged with administering workers' compensation rates its unfettered right to perform its function unencumbered by illegitimate orders to pay workers' compensation benefits emanating from the circuit courts.

Finally, an overarching practical point must be made. As part of the action in the circuit court in this case in 1993, an Amended Economic Analysis of plaintiff's projected losses was submitted by plaintiff to the United States Arbitration and Mediation of Michigan, Inc. (27a *et seq*).[22] Included in that analysis was a valuation of the expected financial loss sustained by plaintiff as projected by an actuary and financial consultant. The projection was reduced to a report, dated July 14, 1993 (*Id.*). Within the paragraph valuating plaintiff's future workers' compensation benefits, the consultant said:

> Beginning in 2004, at age 65, any remaining workers compensation benefits would be offset by old-age social security benefits resulting in essentially a total offset of workers compensation benefits after age 65. (30a).

Therefore, the projected present value of plaintiff's losses at the time of the third party recovery reflected the social security offset. The parties assumed plaintiff's weekly workers' compensation benefits would someday be coordinated. Plaintiff factored into the third party settlement an anticipated offset of social security benefits against workers' compensation benefits. As such, the original consent judgment, executed on the strength of that economic

[22] The exhibit was also attached to the pleadings below and referenced at the hearing before the trial court in this proceeding. (47a).

assumption, should not be understood to mean plaintiff's weekly workers' compensation benefits after the age of 65 would not be reduced.

RELIEF

WHEREFORE, intervenor-appellant, Michigan Mutual Insurance Company, n/k/a Amerisure Mutual Insurance Company, respectfully requests the Supreme Court to reverse the last paragraph of the circuit court's 1993 consent judgment and reverse that court's 2004 order enforcing that last paragraph.

Respectfully submitted,

LACEY & JONES

BY: _____

GERALD M. MARCINKOSKI P32165
Attorneys for Intervenor-Appellant
600 S. Adams Road, Suite 300
Birmingham, MI 48009-6827
(248) 433-1414

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